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No. 1613

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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CALLMAN GOTTESMAN, MARIA MATTIELLO, and PAUL J. PEYSER, *Petitioners*,

*v.*

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS & COMPANY, *Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF RESPONDENT E.I. DU PONT DE NEMOURS & COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | 1 |
| Proceedings Below | 2 |
| Statement | 5 |
| The intercorporate relationship | 6 |
| General Motors' purchases of automotive fabrics and finishes | 8 |
| Fabrics | 9 |
| Finishes | 10 |
| Du Pont's sales to other auto manufacturers | 13 |
| Prices paid by General Motors | 14 |
| Du Pont's profits | 15 |
| Reasons for Denying the Writ | 17 |
| I. The Courts Below Properly Rejected Petitioners' Factual Contentions | 18 |
| II. Neither the Judgment in the Government Case Nor Du Pont's Violation of Section 7 of the Clayton Act Establishes Injury to General Motors | 28 |
| Conclusion | 33 |


## TABLE OF AUTHORITIES


| | |
|---|---|
| *Berenyi* v. *District Director, Immigration & Naturalization Serv.*, 385 U.S. 630 | 18 |
| *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 | 32 |
| *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 | 18 |
| *Gottesman* v. *General Moters Corp.*, 221 F. Supp. 488 (S.D.N.Y.), leave to appeal denied, C.A. 2, Jan. 31, 1964 (unreported), *cert. denied*, 379 U.S. 882 | 4n |

Page

*Gottesman* v. *Metzner*, C.A. 2, Nov. 15, 1966 (unreported) ..... 3n
*Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271 ..... 18
*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 .....18, 24n, 32
*Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 ..... 32
*Schiff* v. *General Motors*, 63 Civ. 533 (S.D. N.Y.) .... 3n
*Schiff* v. *Metzner*, 331 F. 2d 963 (C.A. 2), *cert. denied*, 379 U.S. 881 ..... 3n
*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 ..... 31
*United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 .....2n, 4, 29, 30n
*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 .....4, 29n, 30n
*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 .....31, 32

STATUTES

Clayton Act—

Section 5(a) .....2, 18, 31

Section 7 .....1, 2, 4, 28, 28n, 29, 30

Sherman Act .....3, 28n, 31

Section 1 .....28n, 29n

Section 2 .....28n, 29n

MISCELLANEOUS

C. R. Dean and H. J. DePodwin, Product Variation and Price Indexes: A Case Study of Electrical Apparatus, Proceedings of the Business and Economic Statistics Section of the American Statistical Association 271 (1961) ..... 23n

Federal Rules of Appellate Procedure, Rule 30(e) .... 5n

Comments of the Advisory on Amendments to Federal Rules of Civil Procedure, Rule 33(c) ..... 19n

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### QUESTIONS PRESENTED

1. Whether this Court should set aside as clearly erroneous the trial court's findings of fact, made after a ten-week trial and affirmed by a unanimous court of appeals, that General Motors was not injured by reason of du Pont's ownership of General Motors stock in violation of Section 7 of the Clayton Act because General Motors' purchases of automotive fabrics and fin-

ishes were made in arm's length transactions under competitive conditions.

2. Whether this Court's judgment that du Pont's ownership of General Motors stock violated Section 7 of the Clayton Act conclusively establishes that General Motors was injured by the violation, as petitioners urge, or whether such judgment is prima facie evidence, as is specifically provided in Section 5(a) of the Clayton Act and was held by the courts below, leaving for determination on the basis of the record as a whole whether General Motors was injured in its purchases of automotive fabrics and finishes.

## PROCEEDINGS BELOW

This is a stockholders' derivative action on behalf of General Motors that was filed a few days after this Court's decision holding that du Pont's ownership of approximately 25 percent of General Motors stock violated Section 7 of the Clayton Act because it created a reasonable likelihood of a monopoly in the line of commerce consisting of automotive fabrics and finishes.[1] Petitioners claim that General Motors is entitled to recover from du Pont for injury allegedly suffered as

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[1] *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586. In so holding this Court said:

> "We agree with the trial court that considerations of price, quality and service were not overlooked by either du Pont or General Motors."

but went on to conclude:

> "the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief." 353 U.S. at 606, 607.

the result of its purchases of automotive fabrics and finishes in the period May 1950 through 1959.[2] After extensive discovery, trial was had to a judge sitting without a jury. The trial lasted ten weeks and produced a record consisting of more than 1,000 exhibits, many of them voluminous, and 10,000 pages of testimony from 50 witnesses. The trial court dismissed petitioners' claims in an opinion, rendered in December 1967 (Pet. A40-A89), holding that du Pont's stock interest in General Motors had not been used in violation of the Sherman Act, that General Motors had not been injured in its purchases of automotive fabrics and finishes, and that du Pont had satisfied the burden that would be imposed upon a fiduciary of showing that its dealings with General Motors had been scrupulously fair.[3]

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[2] None of the petitioners owned General Motors stock prior to May 4, 1950. *Schiff* v. *General Motors,* referred to in the Petition (pp. 10-11), was not filed until 1963, after some five years of discovery and other pretrial proceedings in the instant case. The trial court's decision to defer consideration of *Schiff* until termination of the instant litigation was an eminently sound exercise of its discretion, approved by the court of appeals. See *Schiff* v. *Metzner,* 331 F. 2d 963 (C.A. 2), *cert. denied,* 379 U.S. 881.

[3] The trial court's rejection of the affidavit of prejudice by one of the petitioners, which has been lodged with this Court (Pet. 12 n. 44), was unanimously and summarily approved by the court of appeals. (Mandamus denied *sub nom. Gottesman, et al.* v. *Metzner,* C.A. 2, Nov. 15, 1966 (unreported).) Moreover, at the conclusion of the trial, chief counsel for petitioners volunteered:

> "If your Honor please, I think that I would be remiss in my duty as a lawyer and to myself as a human being if I did not express the appreciation and gratitude of the plaintiffs, and, I believe, of the defendants equally, for the patience, forbearance and consideration that we have all received at the hands of your Honor, leavened from time to time with a sense of humor and, nonetheless, an intent and accurate following of the case." (Tr. 9751.)

On appeal, the court of appeals, without reaching the factual findings, held that the trial court (1) had erred in ruling that private actions for antitrust damages may not be based upon a violation of Section 7 of the Clayton Act, and (2) had given insufficient evidentiary weight to the rulings of this Court in the government suit that du Pont's ownership of General Motors stock violated Section 7 and that the stock should be divested, 353 U.S. 586 and 366 U.S. 316. The court remanded for further proceedings, noting that the trial court might or might not "reach the same conclusions as before."[4] (Pet. A21-A39.)

On remand du Pont did not contest that its continued ownership of General Motors stock violated Section 7 in the period 1950-1959. Accordingly, the question for determination was whether such ownership had caused General Motors to buy from du Pont and had resulted in injury to General Motors in its purchases of automotive fabrics and finishes.[5] The trial court reviewed the evidence of record and rendered a second opinion. (Pet. A13-A20.) Affording petitioners "the full evidentiary weight of the government judgment" as directed by the court of appeals, including prima facie weight as to the question of injury (Pet. A18), the trial court dismissed their claims, finding that du Pont's stock interest had not resulted in injury to General Motors because General Motors' purchases of automo-

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[4] The pretrial ruling of the trial court with respect to these matters (Pet. A90-A99; 221 F. Supp. 488 (S.D.N.Y.), leave to appeal denied, C.A.2, Jan. 31, 1964 (unreported), *cert. denied*, 379 U.S. 882), was superseded by this action of the court of appeals, and petitioners' continued reliance on earlier expressions by the trial court is wholly misplaced. (Pet. 12.)

[5] The court of appeals opinion allowed for the receipt of additional evidence on remand, but petitioners offered none and the matter was submitted on the basis of the record made at the original trial. (Pet. A39, A15.)

tive fabrics and finishes were made independently and on a competitive basis.[6] (Pet. A19-A20.)

On a second appeal, the court of appeals,[7] in the decision which petitioners seek to review here, determined that the trial court had fully complied with the instructions on remand, found its findings of fact supported by substantial evidence, and rejected petitioners' claim that this Court's decisions in the government case, together with du Pont's continued ownership of General Motors stock, compelled the conclusion that General Motors had been injured in its purchases from du Pont. (Pet. A1-A12.)

## STATEMENT

Contrary to the assertion that is central to the Petition (Pet. 2, 15), there is a most serious dispute as to the basic facts that govern the decision in this case. The lengthy trial was held to determine the reasons for General Motors' purchasing decisions with respect to

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[6] The record includes 400 exhibits and 3,400 pages of testimony from witnesses that did not appear in the government case and additional testimony, amounting to 1,300 pages, from 16 witnesses who also appeared in the government case.

At respondents' request, the entire record before the court of appeals has been certified and transmitted to this Court. This includes the full trial transcript, referred to herein as "Tr. —." In addition, respondents have lodged with the Court ten copies of Volume II of the Appendix in the court below, which contains testimony of some 24 witnesses, referred to as (195a-557a), and one set of the trial exhibits that were filed with the court of appeals pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure. The exhibits are cited in this brief as "PX —," "DP —," and "GM —."

[7] The members of the court, which petitioners characterize as an *ad hoc* panel (Pet. 10), were Senior Circuit Judge Albert B. Maris, Circuit Judge Leonard P. Moore, and Senior District Judge Sylvester J. Ryan, Judges Maris and Ryan sitting by designation. The unanimous opinion was by Judge Maris.

automotive fabrics and finishes and whether it was overcharged on the materials it purchased from du Pont. Each of the three main propositions asserted by petitioners to be "undisputed" (Pet. Index for pp. 15, 18, 27) was in fact tried and resolved against them on the basis of all the evidence: thus du Pont did not enjoy an entrenched market share of General Motors' business; its prices and profits on sales to General Motors were not higher than those charged and earned on sales of comparable products to other auto manufacturers; and competitors of du Pont were not only in serious contention for General Motors' business but were highly successful.

Accordingly, petitioners' Statement does not permit a fair evaluation of the evidence of record. It consists of a mixture of selected portions of evidence, contentions that have been rejected by the courts below on the basis of reasoned analysis that petitioners omit, isolated passages from this Court's decisions in the government case, and quotations from opinions in other cases. An objective recital of the relevant facts appears in the two opinions of the trial court (Pet. A13, A40), and we will set forth in this statement such summary as is required by reason of the presentation found in the Petition.

*The intercorporate relationship.* During the period in suit, du Pont owned approximately one-quarter of the outstanding common stock of General Motors [8] and had a minority representation on the General

[8] Between 1917 and 1920, du Pont acquired a 38 percent stock interest. By 1939 it had reduced its ownership to 23 percent, which it held through the period in suit. (Pet. A44-A46.) Divestment of du Pont's entire interest in General Motors commenced in 1962 and was completed in 1965.

Motors' Board of Directors.[9] The Board did not initiate any policies or programs relating to operational matters and was completely divorced from purchasing policies and practices. (Pet. A50.)

Throughout the period, the Operations Policy (later Executive) Committee of the Board was exclusively responsible for General Motors' overall operation. It was composed solely of principal operating executives selected by General Motors' chief executive officer. No du Pont nominee was a member of this committee, or participated in the selection of its membership. (Pet. A49-A50.) Du Pont nominees served throughout the period on the Finance Committee and on the Bonus and Salary Committee of the Board.[10] These committees had no jurisdiction over, or connection with, purchasing. (261a-263a, 500a-503a.)

There has been no instance since the early twenties in which General Motors has employed top management personnel who had previously been employed at du Pont. For decades there has been no one in a position of operating responsibility in General Motors who was ever employed by or associated with du Pont. (See Pet. A48-A49, A60-A63.)

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[9] In the period 1950-1959, the General Motors' Board included five du Pont nominees in a total membership of between 30 and 35. (Pet. A49.)

[10] Three of the ten members of the Finance Committee were du Pont nominees. (Pet. A50.) The Bonus and Salary Committee, on which management directors were ineligible to serve, had jurisdiction over supplementary compensation. The trial court, on the basis of a substantial body of evidence, found that monetary awards to General Motors' executives had never been utilized to advance du Pont's interest as a supplier and had never had that effect (Pet. A57-A59), thus flatly rejecting petitioners' innuendo to the contrary (Pet. 29).

The trial court found that du Pont, by reason of its stock ownership and the unrelated ownership of the balance of General Motors shares, had the power to control General Motors (Pet. A52), but went on to find on the basis of all the evidence that du Pont did not in fact control or influence General Motors' purchasing decisions (Pet. A55-A67).

*General Motors' purchases of automotive fabrics and finishes.* General Motors operates with a decentralized organization in which each division has responsibility over the various aspects of its operations, including purchasing. Each division generally has separate engineering and manufacturing departments which test and determine standards of materials to be used in production, and a separate purchasing department which purchases approved materials. (Pet. A55-A57, A74-A75.)

Du Pont's sales of both fabrics and finishes to the General Motors divisions varied from product to product, from year to year, and from division to division, the variation in each case being based upon purchasing decisions that were made independently by the General Motors divisional personnel and were wholly unrelated to du Pont's stock interest. (Pet. A55-A57, A76-A77.) The General Motors divisions regularly purchased in substantial volume from competitors of du Pont—finishes from three such competitors and fabrics from over a dozen.[11] (Pet. A75-A77, A80; DP P; Tr. 3134.)

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[11] Petitioners dissemble in asserting repeatedly that competitors of du Pont were never in serious contention for General Motors' business. (Pet. 6, 14, 28, 30, 33.) The evidence shows that several competitors received more fabrics business than du Pont and others made substantial sales of finishes to General Motors. (Pet. A75-A77, A80.) Petitioners' own witness, Gordon, an experienced paint salesman who had been employed by Forbes Varnish and

In the year 1959 alone, the divisions purchased from competitors of du Pont finishes valued at $17,500,000 and fabrics in the amount of $30,000,000.[12] (GM A; DP P; Tr. 7366, 3134.)

*Fabrics.* Du Pont was not the majority or even the largest supplier of automotive fabrics to General Motors, purchases of which were made by Fisher Body Division for use on all General Motors cars. Such fabrics are plastic or plastic coated materials used in the interior trim and upholstery of automobiles. In 1955 and 1957-1959, the General Tire and Rubber Company, through its Bolta and Textileather Divisions, was Fisher's principal supplier. The Federal Leather Company, a division of Textron, Inc., was the leader in 1956 and second in the other four years. Du Pont was Fisher's third largest supplier in 1955-1957 and

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other smaller companies testified as to his success in selling finishes to the General Motors divisions against competition from du Pont. (Pet. A56.) In addition, petitioners subpoenaed but did not call the Sherwin-Williams Company. (See 508a.)

[12] The record shows that, in addition to automotive fabrics and finishes, du Pont manufactured and sold some eight other lines of products that were used extensively in the automotive industry. In a number of these fields du Pont had far greater success with General Motors' competitors than it did with General Motors. In its efforts to sell General Motors these products, du Pont's success varied with General Motors' assessment of du Pont's offerings and those available from competitors of du Pont: Antifreeze (Tr. 9162-9163, 9180-9184); Plastics (Tr. 9362-9374, 9377-9385); Electrochemicals (Tr. 9528-9530, 9549-9569); Rubber chemicals (Tr. 9419-9421, 9444-9447); Neoprene (Tr. 9421-9444, 9452-9460, 9463-9465); Weather stripping cement (Tr. 6500-6502); Coated fabrics for fuel pumps (487a-488a); Chassis, motor and interior paints (Tr. 4416-4418, 4437-4451). The trial court cited this evidence as reflecting "the independence exercised by each of the divisions of General Motors in their engineering and purchasing policies and practices." (Pet. A56-A57.)

1959. In 1958, du Pont was fourth. In 1955 Fisher purchased less than one fourth of its requirements of automotive fabrics from du Pont. In 1958, the percentage had declined to 13 percent; in 1959 it was 16 percent. (Pet. A80.) Du Pont's sales to Fisher in each of the years 1956 through 1959 were several million dollars less than in 1955,[13] even though du Pont had increased its fabrics production capacity in 1956. (PX 450 p. 6; Tr. 2698.)

*Finishes.* Over the years, three manufacturers, du Pont, the Rinshed-Mason Company, and the Forbes Division of Pittsburgh Plate Glass Company, established a proven record of reliability in meeting delivery schedules for finishes, consisting of topcoats, undercoats, and thinners used on the exterior of automobiles. They showed consistent ability to meet General Motors' exacting standards for uniformity of color, applicability on the production line, and durability in use. (Pet. A73-A74; 319a, 330a-331a.) Of all the suppliers, du Pont proved the most proficient in producing innovative color effects and passing General Motors

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[13] General Motors' purchases of automotive fabrics (through the Fisher Body Division) from du Pont and from its major competitors are shown in the following table:

| Years | Total Purchased | From du Pont | From Competitors of du Pont |
|---|---|---|---|
| 1955 | $39,568,823 | $9,626,976 | $29,941,847 |
| 1956 | 36,837,786 | 6,866,406 | 29,971,380 |
| 1957 | 34,657,334 | 7,369,384 | 27,287,950 |
| 1958 | 29,868,135 | 3,975,160 | 25,892,975 |
| 1959 | 36,148,179 | 5,781,282 | 30,366,897 |

(DP P; PX 76; Tr. 3134, 276a.)

production tests.[14] (Pet. A76.) During the 1950's a fourth manufacturer, Grow Solvent Company, secured increasing amounts of General Motors' requirements for thinners. (Pet. A77.)

Du Pont supplied the General Motors divisions a greater volume of topcoats than either of the other two suppliers (PX 361, 551; see Tr. 3047-3048), a result that stemmed from du Pont's continuing technical leadership in developing and improving lacquer, the topcoat used by General Motors on passenger cars. (See Pet. A74; 308a-309a, 460a-461a.)[15] Du Pont had invented and patented "Duco," a nitrocellulose lacquer that was more durable, dried much more quickly, and made possible the use of a wider range of colors than varnish, which it replaced in the nineteen twenties. (Pet. A68.) After World War II, du Pont developed a new finish based on acrylic plastics rather than nitro-

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[14] Du Pont's maintenance of a color advisory service and its presence at meetings during which General Motors considered color selections for the next model year were a recognition of its competence and leadership. Contrary to petitioners' claim (Pet. 27-28), this gave du Pont no advantage over other suppliers but merely added to its cost of doing business. Once the colors were selected by General Motors every qualified supplier was given the opportunity to match the selections and bid on General Motors' requirements. (291a-293a). And it is not so, as petitioners claim (Pet. 28), that the record is silent on the participation of other suppliers in the color selection process. The testimony shows that du Pont was not the only supplier who attended such meetings (321a), and other suppliers were requested to and did submit color samples—Cook, Forbes, Jones-Dabney and Rinshed-Mason (459a-461a).

[15] Manufacturers other than du Pont, Rinshed-Mason, and Forbes proved unable to meet General Motors' standards for topcoats. Thus the Cook Company quoted prices that were too high. The Acme Division of the Sherwin-Williams Company obtained some topcoat orders, but was dropped for failure to meet quality standards. (Pet. A75-A76.)

cellulose. This finish, perfected and patented in the 1950's, was called "Lucite." General Motors started to test "Lucite" experimentally in 1953 and by 1958 all of its divisions had begun to use acrylic lacquer.[16] (Pet. A70; Tr. 4668-4674, 4676-4680, 6020-6021.)

The General Motors divisions purchased undercoats in substantial quantities from both du Pont and from Rinshed-Mason. Although du Pont had more of this business in 1952, 1953, 1954, 1958, and 1959, Rinshed-Mason had more undercoat business than du Pont in 1951, 1955, 1956, and 1957. (PX 361, 552; Tr. 1384, 3550.) In the early 1950's, du Pont supplied the bulk of General Motors' thinners. Beginning at about that time, however, the materials of the Grow Solvent Company were successfully tested at a number of General Motors divisions, and it was awarded increasing amounts of business. (Pet. A77.) Between 1955 and 1959 du Pont's sales of thinners to General Motors fell by 50 percent—from 9,200,000 gallons to 4,600,000 gallons.[17] (PX 361; Tr. 1384.)

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[16] At the time of its original use in production, "Lucite" cost about one dollar per car more than "Duco," a difference that was subsequently reduced to 25 cents. (Pet. A73 n. 23.) In introducing "Lucite," General Motors charged a premium of $50 to $183 per car for what was termed the "Magic Mirror" finish. (Pet. A78 n. 24; DP M, JO(1), JO(3), JO(6); Tr. 2496, 2531, 7236.)

[17] Petitioners' repeated statement that du Pont sold 74 percent of General Motors' finishes requirements (Pet. 3, 8, 16, 30) refers only to a nine-year average (see Pet. A25-A26), and masks significant variations from year to year and within individual divisions. The record shows, for example, that du Pont sold 63 percent of General Motors' total 1959 purchases of finishes. (Pet. A76.) At Fisher Body—the largest buyer of finishes in General Motors—du Pont went from 68 percent of Fisher's requirements in 1951 to less than half in 1959. (Pet. A76.) At BOP Assembly Division—the second largest user of finishes—du Pont also lost ground, but con-

*Du Pont's sales to other auto manufacturers.* Du Pont was an important supplier to the smaller automobile manufacturers so long as they remained in business. It sold Crosley, Studebaker, Packard, Nash, Hudson, and the successor of the last two, American Motors, more than $8,000,000 of finishes during the 1950's, concentrated in the early years of the decade when these manufacturers were at their strongest. (410a, 445a; PX 335; Tr. 1182.)

Two factors heavily influenced du Pont's position as a supplier to Ford. For many years, Ford has produced the bulk of its own fabrics and finishes. In addition, in the late 1930's, Henry Ford issued instructions that Ford not purchase any materials from du Pont, because of its stock interest in General Motors. Ultimately, Henry Ford II rescinded these instructions, and in the 1950's when du Pont developed its superenamel product, "Dulux 100," it enjoyed considerable success in selling to Ford. Eventually, however, Ford developed a similar enamel of its own, and Ford's purchases from du Pont declined. (Pet. A57; 490a; PX 243; DP MW; Tr. 678, 7950.)

Chrysler, in the early 1930's, determined to find "captive" suppliers for both fabrics and finishes, for whom it would be the principal outlet. For many years Ditzler filled the role of Chrysler's "captive" supplier with respect to finishes; later it was Cook Paint & Varnish Company. (Pet. A57.)

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tinued to supply most of the requirements of the Chevrolet, Buick, and Pontiac Divisions. Rinshed-Mason supplied the substantial majority of Oldsmobile's requirements and replaced du Pont as Cadillac's principal supplier after 1954. (PX 335; GM A; Tr. 1182, 7366.) The trial court concluded: "The reason for the variations between the divisions is that each acted independently of the other for its own best interests." (Pet. A77.)

Du Pont nevertheless sold to Ford and Chrysler in significant amounts. Thus during the 1950's du Pont sold Ford a total of $10,000,000 of finishes and sold Chrysler $4,000,000 of finishes. In the six-year period 1954-1959, Ford purchased $2,000,000 of fabrics from du Pont, and Chrysler purchased $1,000,000, with the majority bought in 1959. (PX 335, 336; Tr. 1182, 1183.)

*Prices paid by General Motors.* The evidence shows that du Pont received orders only when it offered competitive market place prices. Price negotiations were regularly conducted by the purchasing agents of each General Motors division who met individually with each supplier's salesman. (Pet. A55, A74-A75, A83-A84.) Prices were negotiated downward in these sessions, and no supplier, even though satisfactory as to quality and service, was awarded business if it failed to come to or near the lowest price offered by another qualified supplier. The buyers sought to bargain fabrics quotations to within a few cents per yard and finishes prices to within five to ten cents per gallon of the lowest bid, and often did even better.[18] (DP O; Tr. 3130; 212a-216a, 306a, 309a-311a, 346a.) Every supplier from whom purchases were made was given a sufficient amount of business to enable it to achieve the economies of volume production. (311a.)

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[18] Graphic evidence of this negotiating process is provided in an exhibit—DP O—which consists of worksheets used by the Fisher purchasing agent in the course of negotiations over fabrics prices. (214a-216a.) It shows the original price quoted by each principal supplier for each fabric item and also shows the reduced prices that were obtained in negotiations—from du Pont and all other suppliers. Such reductions ranged from ½ cent to six or eight cents a yard.

General Motors assured itself the ability to bargain by regularly purchasing the products it required from at least two and often a greater number of suppliers. For example, lacquer, the topcoat that General Motors used on automobiles, sold at a higher price than enamel, used as an automobile topcoat by Ford and Chrysler.[19] But the price that General Motors paid for lacquer was, by virtue of its negotiating process, at the same competitive level for all suppliers, including du Pont, and that level was the lowest that could be obtained in the market place. Likewise, the price du Pont charged General Motors for lacquer was the same price at which it sold lacquer to other auto manufacturers, a circumstance noted by both the trial court and the court of appeals.[20] (Pet. A11, A78.)

*Du Pont's profits.* Du Pont earned a higher margin of profit on lacquer than it did on enamel.[21] Lacquer, the record overwhelmingly demonstrates, is a superior product and has been so considered by General Motors.

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[19] The price difference between "Duco" lacquer and enamel was about $1.00 per gallon for comparable colors. The difference between "Lucite" and an improved enamel "Dulux 100" was about 75 to 85 cents per gallon. (Pet. A70.) During the early sixties, enamels were improved through the use of acrylics and with such improvement the price of enamels approached the price of "Lucite" acrylic lacquers. (434a-435a.)

[20] Du Pont's sales of lacquer to other manufacturers, on the same prices and conditions as sales were made to General Motors, totaled over $3,000,000. (444a, 447a, 448a; PX 342.) Ford at times used lacquer on its Continental and Chrysler used some lacquer for show cars. (203a.)

[21] As the trial court found and as will be shown hereafter, *infra* pp. 24-27, petitioners seriously mistate the record in their repeated claim that du Pont received "higher prices and rates of profit on all products sold to General Motors . . . ." (Pet. 18; see, also, *id.* 4, 8, 9, 28, 32, 34.)

Lacquers offer a broader range of colors and styling effects, have greater durability, and respond better to polishing after aging, giving General Motors' cars higher resale value as used cars. (Pet. A71-A72.) Enamels are of a different chemical composition that requires baking at high temperature whereas lacquers are air dried. Accordingly, on the assembly line enamel requires more costly equipment, and is more costly to apply because it is more prone to chipping and less easily repaired. (Pet. A71.) The overall cost of finishing a car is approximately the same, whichever finish is used. (Pet. A73; DP KY, PL; Tr. 6341-6342, 7373, 9745.)

General Motors' personnel were fully aware of the relative merits and prices of the two finishes and from time to time reviewed and continued to adhere to the basic decision that lacquer provided a more attractive and satisfactory passenger car finish. (Pet. A71; 273a-277a.) The trial court, rejecting petitioners' contention that General Motors used lacquer rather than enamel in order to enhance du Pont's profits, found that:

> "From all of the evidence, it was General Motors' considered business judgment, well substantiated by the record here, that lacquer was superior to enamel as a topcoat for passenger cars. This business judgment was not affected either directly or indirectly by du Pont's stock ownership of General Motors." (Pet. A73.)

Plaintiffs' own economist agreed that a product having greater styling appeal should yield higher profits, particularly to a manufacturer which shows continuous technological leadership in product development. (Tr. 8032-8034, 8060.)

The superiority of lacquer was also recognized in the automobile refinishing market in which substantial quantities of both lacquer and enamel are sold to some 3,000 independent body shops throughout the country. As in the original equipment market, refinish lacquers and enamels cost about the same to produce. Yet du Pont sold refinish lacquer for $2 to $2.50 a gallon more than refinish enamel, over twice the price and profit difference realized in selling lacquer and enamel to automobile manufacturers, including General Motors.[22] (Pet. A78-A79.)

## REASONS FOR DENYING THE WRIT

The decisions of the courts below, which reflect a reasoned resolution of detailed factual issues, are correct. They apply well-established legal standards and are not in conflict with any decision of this Court or any other court. There are, therefore, no special or important reasons that warrant further review.

This is a case in which a treble damage claimant, after extensive discovery and full trial, has failed to prove injury resulting from a defendant's violation of the antitrust laws. The highly particularized factual question presented for review is devoid of precedential significance. Since the detailed factual findings of the

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[22] Du Pont's profit on lacquers was not abnormal; half of the company's profits were earned on product lines that were more profitable than automotive finishes and numerous products were better earners than lacquers. (238a; DP JR, NW; Tr. 7293-7294, 7296-7297, 7302, 9733a.) These data also show that du Pont's profits on automotive fabrics, the bulk of which were sold to General Motors, were below company average. (By using "mark-up over mill cost" as a measure of profits (Pet. 22) petitioners obtain a misleadingly high percentage. (See Tr. 1630-1632.) Accepted accounting procedure, as reflected in the portions of the record cited here, is to express profits as the percentage that the difference between sales and all costs bears to sales. (See Tr. 9708-9709.))

trial court, based on a voluminous documentary record and observation of numerous witnesses, have been found by a unanimous court of appeals to be supported by substantial evidence, the case presents "concurrent findings of fact by two courts below" of the character that this Court has repeatedly held inappropriate for review. *E.g., Berenyi* v. *District Director, Immigration & Naturalization Serv.*, 385 U.S. 630, 635; *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275.

The only legal issue presented consists of petitioners' attempt to use an antitrust judgment in favor of the United States as conclusive proof of injury in a private damage action. The courts below gave the fullest possible prima facie effect to the government judgment. To have accepted petitioners' contention that such judgment compels a finding of injury to General Motors would have been directly at odds with the express provision of Section 5(a) of the Clayton Act and the decisions of this Court. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 484, 489; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569, 570-71.

### I. The Courts Below Properly Rejected Petitioners' Factual Contentions

In attacking the findings of fact, petitioners make no claim that any significant evidence was ignored. Rather, their essential factual contention is that, despite the substantial body of evidence that discloses why General Motors bought as it did and the competitive prices and terms it obtained, du Pont's continued ownership of General Motors stock and its substantial sales of automotive fabrics and finishes to General Motors compel the inference that the stock interest caused General Motors to buy from du Pont and to pay

inflated prices. Their entire factual presentation to this Court centers on a series of allegations that are thoroughly discredited by the record and were rejected by both courts below.[23]

*a.* Contrary to petitioners' claim that General Motors was "a customer controlled by a stock interest" (Pet. 34), the record shows and the trial court found that neither through its stock interest nor its representation on General Motors' Board or the committees of that Board did du Pont become involved in or in any manner influence or attempt to influence General Motors' purchasing decisions. Such decisions were made by knowledgeable and independent engineering and purchasing personnel in each of the General Motors car and body divisions and were based solely on General Motors' own best interests.

The trial court found that du Pont had satisfied even a fiduciary's burden of showing that its commercial dealings with General Motors were scrupulously fair in that:

> "These sales and purchases resulted from arm's length transactions under competitive conditions. The prices paid by General Motors were market place prices. The quality of the products and the

[23] Petitioners misrepresent the record in claiming (Pet. 28) that du Pont improperly destroyed relevant records. Although certain secondary records could not be found and were apparently destroyed, these were working papers of no permanent value to the company. (Tr. 3657-3658, 3700-3703.) All information on them was made available to petitioners in other forms, and du Pont expended great effort in compiling data requested by petitioners. For example, the compilation of what became PX 342 and 564 required extensive work. (See Tr. 1192-1193, 1255-1270, 1274-1286, 1331-1343.) The trial court surely had discretionary authority, which it plainly did not abuse (see Pet. A82-A83 and n. 81), to require petitioners to make any further compilations they wished. *Cf.* The Advisory Committee's comments on the recent amendments to Fed. R. Civ. P. 33(c).

> service that was furnished with the products were equal to if not better than what was available in the market place." (Pet. A89.)

These findings are supported by detailed evidence, analyzed in the trial court's opinion, showing what du Pont did and did not do as a shareholder of General Motors, how General Motors made purchasing decisions, and how much and what General Motors bought from du Pont and other suppliers.

As has been shown, *supra* pp. 13-14, and as the trial court found (Pet. A57), the fact that du Pont's sales to General Motors were substantially larger than its sales to Ford and Chrysler does not indicate that General Motors purchased on a noncompetitive basis, but simply reflects decisions by those companies unrelated to du Pont's qualifications as a supplier.[24] Indeed, that Ford and Chrysler nonetheless bought millions of dollars of fabrics and finishes from du Pont is testimony to du Pont's competence and competitiveness as a supplier of those products.

*b.* Du Pont had no "entrenched" share of General Motors' purchases, as petitioners claim.[25] (Pet. 15-18,

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[24] Those decisions account for the bulk of du Pont's production of automotive fabrics and finishes being sold to General Motors, a circumstance repeatedly cited by petitioners in support of their claims. (Pet. 6, 8, 16, 34.)

[25] Through selected excerpts and supplied emphasis, petitioners seriously distort the testimony of du Pont officials Mattlage, Johnson and Davis. (Pet. 17-20.) In fact, their testimony fully supports the findings of the trial judge, who heard all three witnesses. Examples of the attempted distortion are: (1) the "historical relationship" referred to by Mattlage (Tr. 2174) as well as the

34). The record irrefutably shows that its success varied depending upon the product, the General Motors division involved, and from year to year, just as one would expect in a freely competitive market. As the trial court found, "If du Pont exercised such control as claimed by the plaintiffs, its level of success in selling to General Motors should have exceeded by far what the evidence shows in this case."[26] (Pet. A55; see, also, *id.* A76-A77, A83.)

In addition, the record makes plain, contrary to petitioners' contention, that the prices at which du Pont sold to General Motors were competitive prices, arrived

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balance of his testimony merely reflect the fact that du Pont had been a long time supplier of General Motors; such a relationship is not uncommon and was enjoyed by other General Motors suppliers; (2) Johnson's use of "pre-emptive" (Tr. 2386) explicitly refers not to General Motors or to any customer but to the "product," lacquer, in which du Pont did enjoy a unique position by reason of its invention and development of both "Duco" and "Lucite"; (3) Davis's statement (Tr. 6192) that competition was encountered in du Pont's effort to sell Ford and Chrysler does not even remotely suggest that General Motors' business was obtained on a noncompetitive basis; indeed, as he and Johnson also testified, competitive conditions controlled price levels in quoting to the General Motors divisions (*e.g.*, 425a; Tr. 2407-2413, 6199), and price reductions by du Pont were necessary before General Motors adopted "Lucite" (Tr. 6004-6034).

[26] Petitioners also claim to find proof of what they call "Du Pont's entrenched market share" in a table showing that du Pont's finishes sales to General Motors varied more or less as did General Motors' production of automobiles. (Pet. 17-18.) Even if there were a complete correlation between changes in General Motors' production and fluctuations in du Pont's sales, that fact would support and not impair the finding that sales were in arm's length transactions and on a competitive basis. If du Pont's sales to General Motors had stayed at about the same level or increased despite fluctuations in sales of cars, only its competitors would have borne the brunt of bad years.

at in intensive bargaining that brought all competing suppliers—including du Pont—to within a few cents of each other.[27] The method of these negotiations, the documention used, and the numerous price concessions that General Motors forced from all suppliers, including du Pont,[28] were all before the trial judge, who also was able to observe and question the men who did the actual buying and selling. Those negotiations—which were imposed by General Motors—reflect the very essence of arm's length transactions. They were de-

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[27] Petitioners err in claiming (Pet. 28) that the du Pont records containing suffix letter prices were "price lists" or "book prices" used to impose prices unilaterally determined by du Pont. The most cursory examination of the record shows that these so-called "price lists" are internal du Pont documents (PX 393-395) used only by du Pont's sales personnel in determining the prices to be quoted prospective purchasers of lacquer. The record shows that the suffix prices were merely a guide and not always quoted or obtained (*e.g.*, "white" lacquers shown at PX 334, 1953 p. 14; Tr. 1182, 2407-2410, 6030-6032), and that even when suffix prices were used, the markup could be greater or less than the amount suggested on PX 393-395. (221a-226a, 423a-426a; Tr. 2060, 2066, 2069.) Also contrary to petitioners' innuendo: (1) du Pont used the "letter suffix" system on all sales of lacquers whether to General Motors or to others; (2) on undercoats and thinners, whether sold to General Motors or others, the suffix system was not used; and (3) although nomenclature at times differed, essentially similar internal procedures and documentation were used in developing bids and quotations, regardless of whether the customer was General Motors, Ford, or any other customer. (219a-226a, 423a-426a; Tr. 2281-2287, 3602-3611, 3616-3620, 3645-3651.)

[28] The evidence shows, for example, reductions in various thinner prices to the General Motors divisions, including formula No. 37648, which accounted for 95 percent of Buick's purchases of thinner from du Pont in 1955. (PX 334 Ex. 68(1953) p. 23 and Ex. 70 (1955) p. 27, PX 335 Ex. 81 (1955) p. 2; DP A; Tr. 1182, 7366.) And of course, as Exhibit DP O demonstrates, every year numerous price concessions were negotiated on fabrics.

signed to secure, and had the result of securing, for General Motors the advantages of competition among all suppliers. Not only did the exhaustive evidence convince the trial court that du Pont had affirmatively established the arm's length nature of its sales to General Motors, but petitioners have never suggested, here or below, how General Motors' purchasing personnel could have conducted themselves to secure lower prices;[29] no evidence was ever offered to show directly or indirectly that any supplier offered or could have offered General Motors comparable quality and service at prices lower than those obtained from du Pont.[30]

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[29] The so-called "price trend" data presented by petitioners (Pet. 25-27) are highly misleading because they ignore actual selling prices and utilize the statistical trick of selecting as a basis for comparison a year in which prices paid by General Motors were considerably lower than prices paid by others, thus misrepresenting the significance of subsequent price changes. For example, in the fabrics vinyl upholstery "price trend" chart (Pet. 26), petitioners show as 100 the year 1954, in which the average price received by du Pont from General Motors was $1.75, from Chrysler $2.08, and from Ford $2.36. (See PX 564; Tr. 1580, 1593-1594.) Similarly, petitioners assign a value of 100 to 1949 undercoat prices (Pet. 26), but they fail to inform the Court that in 1949 other purchasers were paying an average undercoat price of $1.83, whereas General Motors was paying $1.61. Thus, when petitioners show a "price index" of 122 for General Motors and 112 for other customers for 1953 (Pet. 26), they mask the fact that the average price paid by General Motors remained lower—$1.96 per gallon compared to $2.05 per gallon. (See PX 342; Tr. 1616-1617.) Petitioners' own economic expert has noted the frailties of such price indexes in C.R. Dean and H.J. DePodwin, *Product Variation and Price Indexes: A Case Study of Electrical Apparatus,* Proceedings of the Business and Economic Statistics Section of the American Statistical Association 271 (1961).

[30] The trial court did not, as petitioners claim (Pet. 6, 33), impose any new or unduly rigorous burden upon them. The court looked for some evidence in support of their claim that General Motors had been overcharged and found none—in General Motors' records,

*c.* Petitioners' repeated assertion that du Pont charged higher prices and made a higher margin of profit on all products sold to General Motors than it did on products sold to other automobile manufacturers (Pet. 4, 8, 9, 28, 32, 34) is contrary to the evidence, as the trial court found (Pet. A81-A83).

Except for the lacquer-enamel comparison dealt with below, their assertion rests upon an averaging or "lumping together" in which the two essential elements of any price or profit comparison, individual costs and prices, completely lose their identity. As the trial court noted, such a procedure is particularly untrustworthy where, as here, the individual products, depending upon the customers' desires and specifications, vary greatly in color, finish, grade and decorative effects, each of which importantly affects both costs and prices. (Pet. A82.)

Petitioners have attempted to use du Pont's cost accounting system, admitted by their own accountant to be an entirely appropriate system for its purpose, to make profit comparisons as between individual customers, a purpose for which it was never designed. Under this system a number of items within a product line are placed in a single cost group—some 15,000 items are placed into 400 cost groups. The total costs

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from witnesses or elsewhere; in fact, the court concluded that the evidence was inconsistent with any inference that General Motors was injured (e.g., Pet. A55-A57). In so doing, the court was applying the established rule that to recover treble damages a buyer must show "that the price paid by him for materials purchased for use in his business is illegally high and also . . . the amount of the overcharge." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489.

assigned to the group divided by the total number of yards, gallons, or whatever unit of measurement is applicable, will give an average cost. But the cost group figures do not provide any basis for ascertaining the cost of individual items or relating such costs to prices paid by individual customers; costs for all products within the group are lumped together but different customers buy different products within a single accounting group, and each product carries its own price.[31]

Petitioners, five years before trial, were advised by their own accountant that because of the variations in products, an averaging procedure of the kind now relied upon by them "necessarily produces a result which can have no useful purpose." (DP F p. 4; Tr. 1654.) The trial court flatly rejected the profit and price contentions which petitioners pressed upon it and now urge upon this Court. (Pet. A82-A83.) The finding of that court, which the court of appeals specifically approved as being supported by substantial evidence, was "The fact is that merchandise of the same quality and de-

[31] In consequence, the only arguably valid comparison that can be made is of profits earned on cost groups having only products sold to General Motors with profits on cost groups having virtually no sales to General Motors. Although such a comparison is beset by the difficulty of comparing profits on essentially different products (Pet. A11-A12, A81-A82 and n. 29), it would impeach rather than support petitioners' contentions as to du Pont's fabrics profits (Pet. 23-24). Thus, over the period 1954-1959, there were 46 fabrics cost groups showing sales of more than $1,000 only to Fisher; the results ranged from an operative loss of 82.8 percent to an operative profit of 27.3 percent. For 26 such groups sold only to other auto manufacturers in such volume, the range was from a loss of 29.7 percent to a profit of 46.9 percent. The basic data are in PX 564.

scription in a product line was sold by du Pont at the same price to all its customers." [32] (Pet. A78, A11.)

Lacquer and enamel are quite different products, as the evidence clearly shows and the trial court found. (Pet. A70-A73.) Du Pont manufactured and sold both; General Motors used both—lacquer on automobiles and

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[32] Petitioners' approach also ignores product mix as between customers, as is illustrated by the following table, which shows purchases and prices for the three cost groups into which du Pont's thinners were placed for cost accounting purposes in 1949 and 1959:

| | 1949 | | | | 1959 | | | |
|---|---|---|---|---|---|---|---|---|
| | Percent of Total Thinner Purchases | | Average Price Per Gallon | | Percent of Total Thinner Purchases | | Average Price Per Gallon | |
| Cost Group | GM | All Others | GM | All Others | GM | All Others | GM | All Others |
| 740 | 90.6% | 54.1% | $.73 | $.80 | 90.4% | 29.5% | $.82 | $.92 |
| 750 | 8.4% | 25.1% | .78 | .78 | 9.6% | 0% | 1.26 | .. |
| 220 | 1.0% | 20.8% | .49 | .53 | 0% | 70.5% | .. | .61 |

(See PX 342, 1949 and 1959; Tr. 1194.)

In each thinner group in each year the average prices paid by General Motors were as low or lower than those paid by others. Thus, using petitioners' approach of assigning the same average cost to each product within a cost group, du Pont's profits would appear lower on sales to General Motors within each cost group. Petitioners' claim that du Pont secured a higher profit on thinner sales to General Motors (Pet. 24) rests on two statistical tricks: (1) averaging together the prices paid by General Motors and others from all three groups—thereby concealing the fact that others bought a higher percentage of thinner requirements from group 220, a low priced group—and (2) assigning each thinner the same average cost that is derived by totaling the cost figures for all three groups combined.

Similarly, in each of the years 1951-1955, General Motors paid a lower average per gallon price than others for undercoats within cost group 270, from which both bought substantial quantities; the claims as to undercoats that petitioners repeat here (Pet. 25) and were rejected below rest on averaging prices and costs for all undercoats without regard to product mix.

enamel on trucks—and was fully aware of their comparative qualities and prices. In General Motors' business judgment, which is not challenged by petitioners, lacquer was a better finish for automobiles.

The price General Motors paid du Pont for lacquer was the price it obtained by bargaining with all suppliers and thus was the same price it paid du Pont's competitors and the same price at which du Pont sold substantial amounts of lacquer to other auto manufacturers. There is no evidence that lacquer was offered by, or that General Motors could have purchased it from, any supplier at any lower price than it paid. The record is clear that the reasons for du Pont's higher profit on lacquer were that lacquer was a better product, had a higher value in use, and thus could be sold for a higher price than enamel.

*d.* Du Pont's wholly indifferent success in the sale of fabrics to General Motors (decreasing sales representing but 13 to 16 percent of General Motors' requirements in the later years of the period in suit) is a fatal embarrassment to petitioners' claims. It demonstrates most persuasively that General Motors' purchasing decisions were made independently of du Pont influence, that du Pont had no "entrenched share" of the General Motors market, and that competitors of du Pont were not merely in serious contention but were highly successful. Significantly, the same division of General Motors—Fisher Body—that bought substantial quantities of finishes from du Pont, particularly topcoats, was responsible for General Motors' purchase of substantial quantities of fabrics from competitors of du Pont.

Petitioners attempt to blunt the force of the fabrics evidence by urging that du Pont's sales of fabrics to General Motors were limited only by du Pont's pro-

ductive capacity. (Pet. 22-23). The incidents they cite are aspects of the normal relationship between buyer and seller in securing timely delivery on items vital to the continued operation of a high speed assembly line. And, as the trial court noted, there were also a variety of instances when du Pont provided Fisher with service that solved problems caused by other suppliers' failures. (Pet. A83.) Du Pont clearly had adequate capacity to supply General Motors with a far greater volume of fabrics than General Motors chose to buy from it. In 1958, for example, a year in which General Motors purchased almost $26,000,000 of fabrics from competitors of du Pont, its purchases from du Pont were under $4,000,000, substantially less than in each of the three preceding years and barely more than in 1947. Moreover, the record shows that between 1955, when du Pont sold General Motors over $9,600,000 of fabrics, and 1958, du Pont actually added to its productive capacity. (DP P; PX 249, 361, 450 (p. 6); Tr. 3134, 691, 1384, 2698.)

**II. Neither the Judgment in the Government Case Nor du Pont's Violation of Section 7 of the Clayton Act Establishes Injury to General Motors**

Petitioners' legal attack upon the result reached by the courts below rests upon the proposition, stated in various ways, that du Pont's holding of General Motors stock in violation of Section 7 of the Clayton Act[33] nec-

[33] The petition makes the naked assertion that Sections 1 and 2 of the Sherman Act are also involved. (Pet. 7.) Following the remand by the court of appeals, petitioners took the position below that it was no longer necessary to consider the alleged Sherman Act violation in view of du Pont's concession that its ownership of General Motors stock violated Section 7 of the Clayton Act during the years in issue. (Pet. A10.) Accordingly, no question under the Sherman Act is or may fairly be presented by the Petition.

essarily or inevitably caused injury to General Motors. (Pet. Questions Presented 1-3, 6-10, 12.) They assert that this Court so held in the government case when it used such phrases as "entrench," "pry open," and "insulation from free competition." And they claim that the trial court was required to find that such injury continued during the period of suit "in the absence of clear evidence of its termination." (Pet. 5.) In taking this position, petitioners seriously misconceive, as the court of appeals held, both the thrust of Section 7 and this Court's decision in the government case. (Pet. A5-A6.)

Section 7, this Court observed in that decision, "is designed . . . to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result. . . . The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended." 353 U.S. at 589. Accordingly, the determination that du Pont's holding of General Motors stock constituted a violation of Section 7 does not necessarily mean that General Motors suffered any injury by reason of that violation.

The portions of this Court's opinions which petitioners view as a determination that General Motors suffered injury as the result of du Pont's stockholding (353 U.S. at 598-608) do not refer to or even suggest such injury and no such conclusion was drawn. Such passages constitute the basis for this Court's ultimate conclusion that, because of the use that had on occasion been made of du Pont's stock interest to promote its sales in General Motors, particularly in the early 1920's, the district court had erred in finding that there was no reasonable probability of a prohibited

restraint.[34] This Court at the same time expressly agreed with the district court's conclusion that transactions between the companies had been conducted on a fair and honorable basis with due regard for considerations of price, quality, and service. (See 353 U.S. at 606, 607.)

Moreover, the Government at no point contended that General Motors had been injured.[35] In the proceeding on remedy the Government went even further, urging that du Pont's stockholdings had enhanced the financial strength of General Motors, and asserting that du Pont's stock interest gave it a "constant motive and incentive" to prefer General Motors over other automobile manufacturers. (Br. p. 42.)

The question of injury to General Motors was, therefore, not at issue in the government case. This is not to suggest, to be sure, that the decisions in the government case would preclude a finding that the violation of Section 7 had in fact caused injury

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[34] This Court refrained from passing on the Government's appeal from dismissal of its charges that Sections 1 and 2 of the Sherman Act had been violated. (353 U.S. at 588 n. 5.) In its decision on remedy, this Court reiterated that the violation found was one of probability rather than actuality, stating, "For it will be remembered that the violation was not *actual* monopoly but only a *tendency* towards monopoly." (366 U.S. at 325-326.)

[35] The Government stated to this Court that its case did not rest

> "upon a showing of an adverse effect on General Motors; that is, that du Pont has been working against the best interests of General Motors in order to gain an advantage for itself." (Reply Br. p. 1.)

On oral argument counsel for the Government asserted:

> "They [du Pont] have not been using their stock control in order to bring an advantage to them which would be a disadvantage to General Motors and General Motors stockholders." (Tr. oral argument p. 168.)

to General Motors. But whether such injury has been suffered is a matter to be resolved at trial on the basis of evidence disclosing whether the violation influenced General Motors' purchasing policies and whether General Motors was overcharged on products purchased from du Pont, and not by passages from decisions of this Court in which those questions were not even at issue. Such a trial has now been completed and the issues have been resolved against the claim of injury made by petitioners on General Motors' behalf.

What petitioners are entitled to as a result of the prior judgment in favor of the Government, and what they received in full measure pursuant to the remand from the court of appeals, is the prima facie evidentiary advantage accorded a damage claimant by Section 5(a) of the Clayton Act. It is well established that a prior government judgment is only prima facie and is not binding upon the judge or jury in a private damage action where the issues must be decided on the basis of all the evidence of record. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541. Petitioners cannot seriously contend that the trial court failed to accord them every evidentiary advantage contemplated by that Act as interpreted in decisions of this Court, not only on the issue of violation but also on the issue of injury.

Nor is it the law, as petitioners urge, that a violation of the antitrust laws necessarily or inevitably causes injury to everyone within the target area. (Pet. 3, 31, 35.) *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, on which they place heavy reliance, makes clear that the impact of an antitrust violation upon a private party is a matter that must be established by proof. Hazeltine was found to have violated the Sherman Act by conspiring to form illegal

patent pools in Canada, Britain and Australia. The purpose of the scheme was to exclude imported radio and television sets from those countries by denying licenses to foreign manufacturers, including Zenith. This Court upheld the trial court's determination that Zenith had been injured by the denial of a license in Canada. But, rather than suggesting that injury to Zenith might be inferred from Hazeltine's violation, this Court said:

> "Zenith's *evidence, although by no means conclusive, was sufficient* to sustain the inference that *Zenith had in fact been injured* to some extent by the Canadian pool's restraints upon imports of radio and television sets . . . ." 395 U.S. at 114 (emphasis added).

That this determination was grounded on record evidence and not on any theory that violation "necessarily" results in injury is underscored by this Court's refusal to sustain the trial court's award to Zenith with respect to Britain and Australia, despite the fact that the conspiracy extended to those countries, because Hazeltine's violation had not been the cause of Zenith's failure to sell in those countries. 395 U.S. at 125-129.

Accordingly, petitioners' contention that the decisions of the courts below "emasculate the antitrust law by engrafting a rigid mechanical and impossible formula" for proving injury is simply rhetoric. (Pet. 33.) The criteria employed by the district court and affirmed by the court of appeals mark no departure from the tests of private injury long approved by this Court. *Keogh* v. *Chicago & N. W. Ry.*, 260 U.S. 156, 165; *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100.

## CONCLUSION

No justification has been shown for review by this Court of what is essentially a fact case in which the trial court has rejected petitioners' claims of injury on the basis of detailed findings of fact that have been held by a unanimous court of appeals to be supported by substantial evidence.

Respectfully submitted,

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